Re Lau Kah Lay & Anor; ex p Cold Storage (M) Bhd

HIGH COURT (KUCHING) — BANKRUPTCY NO 549 OF 1986
IAN CHIN J
21 JUNE 2001

Bankruptcy *— Discharge — Application — Official Assignee's report revealed inability to investigate wife of bankrupt — Duty of Official Assignee to ensure bankrupt has no stashed away assets — Bankrupt continue to be actively involved in business and lived life of luxury — Whether bankrupt should procure affidavits to show investment in previous business and other finances did not come from assets of bankrupt — Whether application for discharge should be allowed*

The appellants, two bankrupts, appealed against the refusal of the deputy registrar to have them discharged as bankrupts under s 33 of the Bankruptcy Act 1967 ('the Act'). This was the second time that the bankrupts had applied for a discharge, the first having been dismissed by the court. In its judgment, the court directed the Official Assignee ('the OA') to make further investigation and to give a further report. In the report, the OA stated that they were powerless to investigate the wives of the bankrupts.

Held, dismissing the appeal with costs to the creditors:

(1) The OA carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away, whether in his name or in the name of his wife or children, as otherwise people will be imbued with the message that money borrowed could be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt. If the office of the OA does not show itself equal to the task of preventing such rip-off of the creditor, then cases of borrowers not repaying and not minding to be made bankrupt would be the rule rather than the exception. Then, business morality would decline (see p 315E–F).

(2) There were plenty of reasons to suspect that the wife of the bankrupt may be in possession of the property of the bankrupt and that she would at least have the relevant information. The court had referred to some of them in its earlier decision, like the transfer of the land purportedly for valuable consideration within two years of the bankruptcy. Subsequent to the judgment, the transfer was called into question and the wife had to pay a further sum, which the creditors accepted to save the transfer. Some of the relevant facts which should arouse the suspicion of the OA had already been stated in the judgment but all of the facts were available from the notes of proceedings of the examination of the two bankrupts conducted on 16 January 1998 (see p 315G–H).

(3) It was obvious that the triumvirate of the two bankrupts and Liew Jin Nee were replaced by that of Liew Jin Nee and the two wives of the bankrupts. It is obvious that where the previous had left off,

the new trio had continued in the business of the supermarkets with the bankrupts actively involved and so much better off even though with a debt, at one stage, of about RM13m, since they had no traceable assets to meet the debt but yet lived a life of luxury, eg going on overseas trips. All such matters gave rise to a suspicion, and very highly at that, the possibility existed that the assets of the bankrupts may had found their way to their wives to continue the supermarket business where the bankrupts had left off leaving huge unpaid debts but the bankrupts none the worse for it (see p 316E–G).

(4) The alternative step open to the bankrupts if the OA did not bother would be to procure affidavits from their wives and the director and relatives to show that the investment in the supermarket business and the financing of the education of the daughter did not come from any asset which the bankrupts may have. For this purpose, they would have to provide statements of accounts which show where the fund of the wives had come from as to enable them to invest in the business (see p 317E–F).

[**Bahasa Malaysia summary**

Perayu-perayu, kedua-duanya bankrap, telah merayu terhadap keengganan timbalan pendaftar untuk membebaskan mereka sebagai bangkrap di bawah s 33 Akta Kebangkrapan 1967 ('Akta tersebut'). Ini adalah kali kedua di mana kedua-dua bangkrap tersebut memohon satu pembebasan, kali pertama telah ditolak oleh mahkamah. Dalam penghakimannya, mahkamah telah mengarahkan pegawai pemegang harta ('OA') untuk membuat siasatan lanjutan dan untuk memberikan laporan lanjutan. Di dalam laporan tersebut, OA menyatakan bahawa mereka tiada kuasa untuk menyiasat isteri-isteri kedua-dua bankrap tersebut.

Diputuskan, menolak rayuan tersebut dengan kos kepada pemiutang-pemiutang:

(1) OA telah melaksanakan tugas yang berat dalam memastikan bahawa seorang bangkrap tiada aset-aset yang disembunyikan di mana-mana, sama ada dalam nama beliau atau dalam nama isteri atau anak-anaknya, kerana jika tidak, orang awam akan penuh dengan tanggapan bahawa wang yang dipinjam boleh disembunyikan dan tidak perlu dibayar balik dan kemudahan sedemikian banyaknya boleh dinikmati walaupun jika seseorang itu bangkrap. Sekiranya pejabat OA tersebut tidak menunjukkan sendirinya saksama dengan tugas menghalang tindakan tersebut terhadap pemiutang, maka kes-kes peminjam tidak membayar balik dan tidak kisah dijadikan bangkrap akan menjadi satu peraturan dan bukannya satu pengecualian. Oleh itu, moral dalam perniagaan akan menurun (lihat ms 315E–F).

(2) Terdapat banyak sebab untuk mensyaki bahawa isteri si bangkrap mungkin memiliki hartanah bangkrap dan bahawa si isteri sekurang-kurangnya mempunyai maklumat relevan. Mahkamah telah merujuk kepada beberapa maklumat tersebut dalam keputusan terdahulu, seperti pemindahmilikan tanah yang dikatakan untuk balasan bernilai dalam tempoh dua tahun kebangkrapan tersebut. Berikutan penghakiman tersebut, pemindahmilikan tersebut telah diselidiki dan si isteri terpaksa membayar jumlah lanjutan, di mana pemiutang-pemiutang terima untuk menyelamatkan pemindahmilikan tersebut. Beberapa fakta yang relevan yang sepatutnya menimbulkan rasa syak OA telahpun dinyatakan dalam penghakiman tersebut tetapi semua fakta tersebut terdapat daripada nota-nota prosiding pemeriksaan kedua-dua bangkrap yang telah dikendalikan pada 16 Januari 1998 (lihat ms 315G–H).

(3) Adalah jelas bahawa perjalanan perniagaan oleh kedua-dua bangkrap dan Liew Jin Nee telah digantikan oleh Liew Jin Nee dan kedua-dua isteri kepada kedua-dua bangkrap tersebut. Adalah jelas bahawa setakat mana yang ditinggalkan, tiga serangkai yang baru tersebut telah meneruskan perniagaan pasaraya-pasaraya dengan kedua-dua bangkrap terlibat dengan giat dan lebih berada walaupun berhutang, pada satu ketika, lebih kurang RM13j, memandangkan mereka tidak mempunyai aset-aset yang boleh dikesan untuk membayar hutang namun begitu hidup dalam kesenangan, seperti melancong ke luar negara. Semua perkara tersebut menimbulkan rasa syak, dan boleh wujud kemungkinan besar bahawa aset-aset kedua-dua bangkrap mungkin telah disimpan oleh isteri-isteri mereka untuk meneruskan perniagaan pasaraya tersebut di mana kedua-dua bangkrap telah meninggalkan hutang besar yang tidak berbayar tetapi keadaan ini tidak menggugat kedua-dua bangkrap tersebut (lihat ms 316E–G).

(4) Langkah alternatif yang terbuka kepada kedua-dua bangkrap tersebut jika OA tidak kisah adalah untuk mendapatkan afidavit-afidavit daripada isteri-isteri mereka dan pengarah dan sanak-saudara untuk menunjukkan bahawa pelaburan dalam perniagaan pasaraya dan pembiayaan pelajaran anak perempuan tersebut tidak datang daripada mana-mana aset yang mungkin dimiliki oleh kedua-dua bangkrap tersebut. Bagi tujuan ini, mereka perlu memberikan penyata-penyata akaun untuk menunjukkan dari mana wang tersebut datang bagi membolehkan mereka melabur dalam perniagaan tersebut (lihat ms 317E–F).]

Notes

For cases on applications to discharge a bankrupt, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1638–1641.

Cases referred to

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 31, 33

Frank Tang (*Tang & Partners*) for the bankrupts.

Michael Bexter (*Ee & Lim*), *Chong Chieng Jen* (*Chong Brothers*), *George Chapman* (*Lim Tan & Partners*), *Fabian Sigar* (*John Shek & Co*), *Doris Chong* (*Battenberg & Talma*) and *Yong Sie Mee* (*Goh & Partners*) for the creditors.

Simon Tan for the Inland Revenue Department.

Koh Fui Long for the Official Assignee.

Ian Chin J. : This is an appeal by two bankrupts Lau Kah Lay and Tang Kuong Tiew against the refusal of the Deputy Registrar to have them discharged as bankrupts under s 33 of the Bankruptcy Act 1967 ('the Act'). The proper manner in which to consider this appeal is stated in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 (SC) to be (at p 98):

> Held 1(a) — A judge in chambers who hears an appeal from a discretionary order of the registrar, exercises his own discretion as if the matter comes before him for the first time, unfettered by the previous exercise of the registrar's decision. The judge will give the registrar's decision whatever weight it deserves.

This is the second time that the bankrupts had applied for a discharge, the first having been dismissed by me on 21 February 1998 and in which judgment I directed the OA to make further investigation and to give a further report. That report has been given but the OA in the report stated that they are powerless to investigate the wives of the bankrupts. The law in this regard is s 31 of the Act, viz:

> Discovery of debtor's property
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> (1) The court may, on the application of the OA or of any creditor who has proved his debt at any time after a receiving order had been made against a debtor, summon before it the debtor, or any wife of his, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court deems capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.
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> (2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the court at the time of its sitting and allowed by it, the court may by warrant cause him to be apprehended and brought up for examination.

(3) The court may examine on oath, either by word of mouth or by the written interrogatories, any person so brought before it concerning the debtor, his dealings or property.

(4) If on the examination of any such person it appears to the court that he is indebted to the debtor, the court may, on the application of the OA, order him to pay to the OA, at such time and in such manner as to the court seems expedient, the amount in which he is indebted or any part thereof, either in full discharge of the whole amount in question or not as the court thinks fit, with or without costs of the examination.

(5) If on the examination of any such person it appears to the court that he has in his possession any property belonging to the debtor the court may, on the application of the OA, order him to deliver to the OA such property or any part thereof at such time and in such manner and on such terms as to the court seems just.

(6) The powers given to the court under this section may in all cases be exercised by the Registrar and any order made or act done by the Registrar shall be deemed the order or act of the court.

The OA also took the position that it is up to the creditors to do their investigation but the primary duty is upon the OA. The OA cannot take the same attitude of the creditors because that office serves a greater interest than the self-interest of the creditors. It is understandable why creditors cannot afford to take further steps that involve costs to them as they are already saddled with a debt they have yet to recover and therefore it is unreasonable to expect them to expend money to do the things which the OA is authorized to do under the Bankruptcy Act 1967. The OA carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away whether in his name or in the name of his wife or children as otherwise people will be imbued with the message that money borrowed can be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt. If the office of the OA does not show itself equal to the task of preventing such rip-off of the creditor, then cases of borrowers not repaying and not minding to be made bankrupt will be the rule rather than the exception. Then the business morality will decline.

The office of the OA despite my order has said that they have no power to investigate the wife. Surely, that office is aware of s 31(1) of the Act. There are plenty of reasons to suspect that the wife of the bankrupt may be in possession of the property of the bankrupt and that she would at least have the relevant information. I have referred to some of them in my earlier decision, like the transfer of the land purportedly for valuable consideration within two years of the bankruptcy. Subsequent to the judgment the transfer was called into question and the wife had to pay a further sum which the creditors accepted to save the transfer. Some of the relevant facts which should arouse the suspicion of the OA have already been stated in my said judgment but all of the facts are available from the notes of proceedings of the examination of the two bankrupts conducted on 16 January 1998. The following facts emerged from the examination:

(1) The wife of the bankrupt Law Kah Lay (and she is also the sister of the other bankrupt Tang Kuong Tiew) had prior to her marriage to

the bankrupt worked as a shop assistant in a supermarket for a salary of between RM200 to RM30

(2) About a year after her husband became a bankrupt she became a shareholder in a holding company ('Kasada') which owns a chain of supermarkets but hitherto she was never a director of any supermarket company;

(3) The bankrupt was before his bankruptcy also involved in a chain of supermarkets and the debts he owed came as a result of his being a guarantor of those supermarkets

(4) The wife claimed the money which enabled her to invest in the holding company came from her father

(5) The bankrupt worked for a company ('Kanion') owned by a Liew Jin Nee who was a fellow director of his in a company and is also a fellow director of the wife in the holding company Kasada and the wife of the other bankrupt is also a director of Kasada

(6) The bankrupt alleged that he was after his bankruptcy sent by Kanion on business trips to Thailand, Singapore, Hong Kong, Australia, Canada and other South East Asian Countries and he was allowed by the office of the OA to do so after making various payments;

(7) The bankrupt's daughter was educated overseas after he was made a bankrupt and this was alleged to have been financed by relatives;

From those facts, it is obvious that the triumvirate of the two bankrupts and Liew Jin Nee are replaced by that of Liew Jin Nee and the two wives of the bankrupts. It is obvious that where the previous had left off the new trio has continued in the business of the supermarkets with the bankrupts actively involved and so much better off even though with a debt, at one stage, of about RM13m, since they have no traceable assets to meet the debt but yet live a life of luxury, like overseas trips. Then there is the question of why the wives should dive into the supermarket business when their husbands have failed. As for those trips it is hard to accept that they are for business since Kanion which is involved in purchasing goods need not venture out as the supplier would be queuing up at their door to sell their wares. All the matters I mentioned give rise to a suspicion, and very highly at that, the possibility exists that the assets of the bankrupts may have found their way to their wives to continue the supermarket business where the bankrupts have left off leaving huge unpaid debts but the bankrupts none the worse for it.

At the very least the OA should follow the trails of the involvement of the wives of the bankrupts in the supermarket business where their bankrupt husbands are without question the directing mind and body.

(1) The wives should be questioned as to where they get the money and to show proof of it; and

(2) The accounts of those companies involved should be examined by an expert to unearth the trails of the money

A For the purposes, the office of the OA must not simply accept statements like, for example of the wives, 'I got the money from my relatives' without going further and establishing that the money really come from the relatives. The amount of money involved would not be small since Kasada owned a chain of supermarkets known as Supermart, Grand and Big Fresh where the bankrupts' wives are now involved as shareholders and B directors. It must also not be forgotten that apart from the wives, the other director would be able to shed light. The OA should have applied under s 31 of the Act for these people to be summoned and examined. None of the reports prepared by the OA had covered those grounds. As for the scope and purpose of s 31 of the Act, this is what *William & Muir Hunter on* C *Bankruptcy* (19th Ed) at p 113, has to say:

> The powers contained in this section are primarily directed to enabling the court to help a trustee in bankruptcy to discover the truth of the circumstances relating to the bankrupt's property, dealings and affairs, with as little expense and as much expedition as possible, and with a particular view to the recovery of assets and ascertainment of the validity of creditors' claim.
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> D The trustee if dissatisfied with the information given to him by the bankrupt, is entitled to summon the bankrupt for examination, and need not show that the bankrupt has made default in providing information, and the same power is conferred by the section with respect to the bankrupt's wife (or, it is presumed, her husband). The power to examine the bankrupt continues after his discharge, and may extend, after his death, to his personal E representatives. In the case of witnesses other than the bankrupt (or his wife or her husband), the trustee may be called upon to show that some enquiry has already made of the witnesses, eg by letter, without satisfactory result.

The alternative step open to the bankrupts if the OA does not bother would be to procure affidavits from their wives and the said director and relatives F to show that the investment in Kasada and the financing of the education of the daughter did not come from any asset which the bankrupts may have. For this purpose they will have to provide statements of accounts which show where the fund of the wives had come from as to enable them to invest in Kasada. Unless I have that or unless I have a report of the OA that those matters giving rise to the suspicion that assets of the bankrupt may have G found their way to the wives are reasonably explained away (with supporting evidence) I am not disposed to discharging the bankrupts even with conditions. I am also of the view that the deputy registrar had for the reasons stated in his judgment, which I do not propose to set out, correctly exercise his discretion in refusing the application to discharge the bankrupts.

H The appeal is therefore dismissed with costs to the respondent creditors.

Appeal dismissed.

Reported by Wong Ee Lynn

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